

1 **Woodrow Edgar Nichols, Jr. #142932 11:10045**

2 Attorney at Law  
3 2141 Tuolumne, Ste "O"  
4 Fresno, CA 93721  
5 (559) 228-3125

6 Attorney for: JESUS LOPEZ

7 **UNITED STATES COURT OF APPEALS**  
8 **FOR THE NINTH CIRCUIT**

9 UNITED STATES OF AMERICA,	)	Case No. 11-10045
	)	
10 Plaintiff-Appelle,	)	D.C. No. 1:09-cr-00299-LJO-4
	)	
11 vs.	)	U.S. District Court for Eastern
	)	California, Fresno
12 JESUS LOPEZ,	)	
	)	<b>MOTION TO WITHDRAW AS ATTORNEY OF</b>
13 Defendant-Appellant.	)	<b>RECORD</b>
	)	

14  
15 TO THE HONORABLE JUSTICES OF THE ABOVE-ENTITLED COURT:

16 On February 2, 2011, this court issued an order concerning  
17 Appellant JESUS LOPEZ's pro se appeal, ordering counsel to file a  
18 motion to withdraw as counsel within 21 days if counsel wished to  
19 withdraw, accompanied by a statement of reasons and proof of  
20 service on Appellant.

21 The court was under the impression that counsel had been court  
22 appointed and issued a new order that counsel make a new motion to  
23 withdraw as counsel accompanied by a declaration of Appellant  
24 desiring to abandon his appeal. Appellant, through counsel, filed  
25 a Notice of Abandonment of Appeal with a signed declaration of  
26 Appellant with this Court on February 18, 2011, stating his wish,  
27 after being fully advised by counsel, to do so. Therefore, counsel  
28 respectfully request this court grant his motion to withdraw as

1 counsel of record. The reasons counsel makes this renewed motion  
2 to withdraw as counsel are as follows:

3 1. Defendant JESUS LOPEZ entered into a signed plea agreement  
4 with the government and his appointed counsel, Ms. Barbara O'Neill,  
5 on July 9, 2010, specifying that he would not appeal his sentence  
6 and that he would not file any habeas petition. Section 3(f) of  
7 the Memorandum and Plea Agreement pursuant to Rule 11(c)(1)(B) of  
8 the Federal Rules of Criminal Procedure, states:

9 "The defendant understands that the law gives him a  
10 right to appeal his conviction and sentence. The  
11 defendant waives any right to appeal his conviction and  
12 sentence and any right he may have to bring any other  
13 post-conviction attack on his conviction and sentence.  
14 He specifically agrees not to file a motion under 28  
15 U.S.C. section 2255 or section 2241 attacking his  
16 conviction and sentence." (Id.)

17 2. That counsel was retained by the defendant's family in  
18 October 2010, in order to give a second opinion and make a motion  
19 to withdraw the plea if good cause was found. Counsel found none,  
20 and explained to Mr. LOPEZ that if the judge downward departed for  
21 overstatement of criminal history, he was looking at a sentence of  
22 188 months. The recommended guideline sentence of the Presentence  
23 Investigation Report by United States Probation Officer, Summer I.  
24 Robinson, was for 262 months.

25 3. Mr. LOPEZ was scheduled to be sentenced on December 23,  
26 2010. However, at the very start of the hearing, Mr. LOPEZ  
27 interrupted the proceedings and told Judge O'Neill that he was  
28 guilty as charged and deserved to be punished, but thought that the  
range of sentencing was too great, believing that he deserved the  
ten year minimum sentence. Moreover, he also told the Judge that

1 Ms. O'Neill had lied to him when she had allegedly told him that he  
2 would only get the statutory minimum of ten years if he signed the  
3 agreement. Furthermore, he stated that at the time that he entered  
4 his plea before Judge Oliver W. Wanger, Ms. O'Neill allegedly told  
5 him to say "yes" to everything asked him and he would get no more  
6 than ten years.

7 4. Judge O'Neill then strongly suggested to retained counsel  
8 that it was his duty to make a motion to withdraw the plea and to  
9 request an evidentiary hearing since the allegations were serious.  
10 Counsel made said motion and a hearing was set for an evidentiary  
11 hearing on January 14, 2011.

12 5. Over the weekend before the hearing, counsel had an  
13 interview with Mr. LOPEZ in the Fresno County Jail and explained to  
14 him that he was in danger of losing the benefit of the bargain he  
15 had under the government's plea agreement, and that he reconsider.  
16 Mr. LOPEZ reconsidered and decided he wished to withdraw the motion  
17 to withdraw the plea and proceed with sentencing so as not to lose  
18 the benefit of his bargain.

19 6. That, on January 14, 2011, at the time of the hearing on  
20 the motion, counsel explained to Judge O'Neill that Mr. LOPEZ did  
21 not wish to lose the benefit of the bargain with the government and  
22 that he wished to withdraw the motion and proceed with sentencing.

23 7. That, Judge O'Neill examined Mr. LOPEZ, who admitted that  
24 he had lied to the Judge about his accusations against Ms. O'Neill  
25 and was sorry for it. Judge O'Neill then required that Mr. LOPEZ  
26 apologize directly to Ms. O'Neill, who was present because of the  
27

1 set evidentiary hearing, and Mr. LOPEZ did so, asking for  
2 forgiveness. Ms. O'Neill graciously forgave Mr. LOPEZ.

3 8. Judge O'Neill did not hold the false accusations about Ms.  
4 O'Neill against Mr. LOPEZ, downward departing so that Mr. LOPEZ  
5 received 188 months, the benefit of his bargain.

6 9. That, for some unknown reason, Mr. LOPEZ then chose to  
7 file a Notice of Appeal, which was filed in the Eastern District,  
8 Fresno Division, on January 26, 2011.

9 10. Counsel subsequently visited him in the Fresno County  
10 Jail on February 11, 2011, having prepared a Notice of Abandonment  
11 of Appeal for him, explaining that under the plea agreement he had  
12 waived his right to appeal. Moreover, he had entered a plea of  
13 guilty before Judge Wanger, and openly admitted he was guilty and  
14 deserved to be punished before Judge O'Neill.

15 11. Counsel also served Mr. LOPEZ, pursuant to the court's  
16 order, a copy of said Order as well as the Time Schedule Order on  
17 that same date, to wit, February 11, 2011.

18 12. Mr. LOPEZ declined to sign the Notice of Abandonment of  
19 Appeal at that time without stating any valid legal reason to  
20 counsel why he desired to appeal his judgment and sentence.  
21 Moreover, he reluctantly received the papers served on him.

22 13. Counsel does not believe that the Ninth Circuit has  
23 jurisdiction over this appeal because Appellant specifically  
24 contracted away his right of appeal in order to receive the benefit  
25 of the bargain he had under the plea agreement, which he received  
26 at the time of sentencing.

1 14. Counsel does not believe that there is any benefit for  
2 his client from an appeal because the Judge downward departed on  
3 the grounds that his criminal history was overstated. In counsel's  
4 opinion and belief, 188 months is as low a sentence as he could  
5 have gotten, and that counsel would thus have a conflict in  
6 prosecuting the appeal.

7 15. Counsel delivered a copy of his first Motion to Withdraw  
8 as Attorney of Record on JESUS LOPEZ at the Fresno County Jail on  
9 February 14, 2011.

10 16. That on February 18, 2011, in obedience to the court's  
11 order, filed February 16, 2011, I again visited Mr. LOPEZ in the  
12 Fresno County Jail, and provided him with a copy of our combined  
13 Motions to Withdraw as Counsel and Motion for him to Proceed Pro  
14 Se. I also provided him a prepared Motion to Proceed In Forma  
15 Pauperis and a Form CJA 23, and explained to him how to fill it out  
16 and where to send it.

17 17. That after being fully advised, Appellant realized the  
18 futility of proceeding with the Appeal and voluntarily signed a  
19 Notice of Abandonment of Appeal, which I diligently filed with the  
20 Court on the same day.

21 Counsel therefore respectfully requests that the Court grant  
22 his renewed motion to withdraw as counsel for the reasons stated  
23 above.

24 DATED: February 21, 2011

Respectfully submitted,

25 /s/ Woodrow E. Nichols, Jr.  
26 WOODROW E. NICHOLS, JR.  
27 Attorney for JESUS LOPEZ  
28 Defendant/Appellant

**DECLARATION OF COUNSEL**

I, WOODROW E. NICHOLS, JR., do hereby declare under penalty of perjury as follows:

1. That I was the retained attorney of record for JESUS LOPEZ at the district court level.

2. That all of the above facts and reasons alleged in support of my renewed Motion to Withdraw as Attorney of Record are true and correct.

3. That on February 18, 2011, I went to the Fresno County Jail and explained the circumstances to the Appellant, JESUS LOPEZ, to wit, that I needed to withdraw as counsel before he would be allowed to proceed pro se. I went over the Court's Order with him and explained how to fill out the Form CJA 23 since he is indigent and cannot afford the \$455.00 filing fee for his appeal. I also provided him with a prepared Motion to Proceed In Forma Pauperis to file with the Form CJA 23.

4. That Mr. LOPEZ realized the futility of proceeding pro se and signed at the time a Notice of Abandonment of Appeal, which I electronically filed with this court on the same date.

Executed in Fresno, California, this 21th day of February, 2011.

/s/ Woodrow E. Nichols, Jr.  
WOODROW E. NICHOLS, JR.  
Declarant

**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2141 Tuolumne Street, Ste. "O", Fresno, CA 93721.

On February 21, 2011, I served the following document:

**MOTION TO WITHDRAW AS ATTORNEY OF RECORD**

XXX by the U.S. Mail to Appellant JESUS LOPEZ at the Fresno County Jail at the following address:

Mr. JESUS LOPEZ  
Fresno County Jail  
North Annex, Third Floor  
Jail ID NO. 7019152  
P.O. Box 872  
Fresno, CA 93712

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Fresno, California on February 21, 2011.

/s/ Woodrow E. Nichols, Jr.  
WOODROW E. NICHOLS, JR.  
Declarant